No. 89-152

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VERA M. ENGLISH,
Petitioner,
v.
GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May state tort law be used to regulate alleged "whistle-blower" discrimination in the nuclear industry where Congress has established a pervasive and delicately-balanced regulatory scheme governing such conduct in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, and where the application of state tort standards to such claims would frustrate the objectives and purposes of Congress reflected in that statute?

RULE 28.1 STATEMENT

Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Capital Corporation; General Electric Credit Corporation; General Electric Credit International, N.V.; General Electric Overseas Capital Corporation; and RCA Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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STATEMENT OF THE CASE

In this case Petitioner English seeks review of a Fourth Circuit judgment dismissing her state tort claim for intentional infliction of severe emotional distress on the ground that the tort claim is preempted by Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. The factual and procedural background underlying the case is summarized briefly below.

A. Petitioner's Violation of Federal Safety Standards and Allegations Regarding General Electric's Response

Vera English worked in the Chemical-Metallurgical ("Chemet") Laboratory at General Electric's Wilmington, North Carolina nuclear fuel manufacturing facility

until March 15, 1984. On that date she was removed from the Chemet Lab and reassigned to a temporary job outside the nuclear "controlled area" after admitting that she had deliberately failed to clean up potentially dangerous radioactive contamination in the Laboratory as required by applicable radiation safety procedures, thereby causing a violation of the requirements of the Atomic Energy Act. See Pet. App. 2a, 8a-10a. On May 15, 1984, English was advised that the temporary job would continue for only three months from April 30 and that, during that time, she should bid on a permanent job in an area of the facility that was not nuclear-sensitive. Pet. App. 10a. On July 30, 1984, the temporary job ended and English, having failed to bid on another job, was placed on layoff (*id.*)—a circumstance she describes as "fired." [1]

In a series of legal actions over three years culminating in the present lawsuit, English has alleged that she was discriminatorily removed from the Chemet Lab and ultimately terminated because she had earlier complained about alleged GE safety violations to GE officials and to the Nuclear Regulatory Commission ("NRC"). Pet. App. 10a. In addition, English alleged that she was subjected to other retaliatory acts of harassment between the time she was removed from the Chemet Lab and her ultimate termination, including, for example, being isolated from her fellow workers and watched constantly by a member of management, being barred from nuclear-sensitive controlled areas, being sent home one day to change into "safe shoes," etc. *Id.* at 9a-10a. According to English, GE undertook all of these activities for the purpose of punishing her for making safety complaints, preventing

[1] In fact, English was laid off with full lack-of-work benefits and subsequently was placed in a non-working leave status which allowed her to retire under GE's pension plan and which included substantial medical and other insurance benefits. *See English v. Whitfield*, 858 F.2d 957, 960 n.1 (4th Cir. 1988).

her from obtaining evidence to prove that GE was not in compliance with federal safety regulations, and humiliating and exposing her to the contempt and ridicule of her fellow employees in order to teach her and other GE employees that they should not insist upon compliance with federal safety regulations or report such violations to the NRC. *Id.* at 10a.

B. Petitioner's Federal Administrative Complaints

The first of English's legal actions commenced on August 24, 1984, when she filed a complaint with the U.S. Department of Labor ("DOL") under Section 210 of the ERA, which prohibits nuclear industry employers from retaliating against employee "whistleblowers." In the DOL action, English sought approximately $2.3 million in backpay and compensatory damages for emotional pain and suffering, and over $1 million in attorney's fees and expenses for litigating her claims. That proceeding involved considerable pretrial discovery, consumed 11 days of trial, produced almost 2,500 pages of transcript and 120 exhibits, and culminated in over 500 pages of post-trial briefs and attachments submitted on behalf of English alone.

Although the DOL Administrative Law Judge ("ALJ") recommended that a Section 210 violation be found with respect to English's job reassignment and resulting termination, the Secretary of Labor ultimately ruled that claims relating to these matters were barred by the statute of limitations in Section 210. *English v. General Electric Company*, No. 85-ERA-2 (Secretary's Decision, January 13, 1987). On judicial review, the Fourth Circuit affirmed that conclusion, but remanded the case to DOL for consideration of whether English had established that she was subjected to a course of retaliatory harassment following her removal from the Chemet Lab. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). On remand, the ALJ determined that the

harassment claim should also be dismissed based on his factual finding that English was not subjected to any acts of harassment after her removal from the Chemet Lab was made final. *English v. General Electric Company*, No. 85-ERA-2 (ALJ Recommended Decision and Order, April 5, 1989). That determination is presently pending before the Secretary of Labor pursuant to English's exceptions to the ALJ's recommended decision.

Concurrent with the DOL proceedings, English commenced a second action before the Nuclear Regulatory Commission in which she contended that GE's alleged discriminatory treatment violated the NRC's nuclear safety requirements. English urged the NRC to fine GE over $40 million for these alleged violations, and to order GE to pay English over $2.3 million for lost wages, psychological pain and suffering, etc. The NRC rejected English's claim for compensatory relief but, over GE's objection, imposed a $20,000 fine based on the DOL ALJ's unreviewed recommendation that a Section 210 violation be found with respect to English's termination. See Pet. App. at 57a-58a.[2]

C. Petitioner's Tort Suit

Finally, English commenced the instant action in the district court on March 13, 1987. In her complaint, English asserted that these same acts constituted a "wrongful discharge" in violation of public policy and intentional infliction of severe emotional distress under North Carolina law. For these alleged wrongs, she sought almost $1.5 million in compensatory damages and approximately $2.3 *billion* in punitive damages. Pet. App. 6a.

Thus, for its efforts to meet nuclear safety concerns by removing from the nuclear-controlled area of its facility a single employee who, by her own admission, deliber-

[2] GE had challenged the merits of the ALJ's first recommended decision before the Secretary of Labor, but the Secretary never reached those issues because of his statute of limitations ruling.

ately allowed a radioactive safety hazard to exist, GE was met with three separate legal actions claiming total aggregate damages, penalties and attorney's fees of several billion dollars. On February 10, 1988, the district court granted GE's pre-answer motion to dismiss the last of these actions. Pet. App. 6a-29a. The court dismissed English's wrongful discharge and emotional distress claims on the ground that the claims are preempted by Section 210 of the ERA, and also dismissed the wrongful discharge claim on the alternative ground that her allegations failed to state a claim upon which relief can be granted under North Carolina law. *Id.* at 29a.[3]

On appeal, the Fourth Circuit affirmed the district court's preemption finding for the reasons expressed in the district court's opinion. Pet. App. 3a. The instant petition for certiorari followed the Fourth Circuit's denial of English's petition for rehearing and suggestion for rehearing *en banc*.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FOURTH CIRCUIT RECOGNIZED AND CORRECTLY APPLIED THIS COURT'S PREEMPTION PRECEDENTS

As both courts below recognized, the ultimate determinant of federal preemption is congressional intent. *E.g.*, *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 290 (1986); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Although Congress may occasionally state such an intent expressly, Congressional intent to preempt is more often found in the nature of the federal legislation. For example:

> Congress' intent to supersede state law altogether may be found from "a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supple-

[3] English did not appeal the district court's dismissal of her wrongful discharge claim. Pet. App. 2a n.1.

> ment it,' [or] because the Act 'of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . .'"

Pacific Gas & Electric Co. v. Energy Resources Comm'n, 461 U.S. 190, 203-204 (1983), *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

Moreover, even if it cannot be shown that Congress has evidenced an intent to displace entirely all state regulation in a given area, such state regulation is nevertheless implicitly preempted if it conflicts with federal law. Such a conflict exists not only when a state statute or rule of decisional law substantively conflicts with a specific federal mandate, but also "where state law 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'" reflected in the federal statute. *Id., quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Thus, where "the imposition of a state standard in a damages action would frustrate the objectives of the federal law," the state action is preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

Applying these standards in the instant case, the lower courts found that English's emotional distress claim was preempted because it sought relief for actions covered by Section 210 of the ERA, which the courts found to be "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." Pet. App. at 22a-23a, *quoting Pacific Gas & Electric*, 461 U.S. at 204. Equally important, the courts below found that imposition of state tort standards to actions cognizable under Section 210 would conflict with federal law by frustrating the accomplishment and execution of the full purposes and objectives of Congress reflected in that provision. Pet. App. at 19a-23a. The courts were right on both counts.

A. Congress Created A Pervasive Federal Scheme Covering the Conduct Alleged By Petitioner

It is clear that Section 210 of the ERA does, in fact, establish a pervasive scheme of regulation which provides extraordinarily broad protection and remedies for nuclear industry whistleblowers. See Pet. App. at 12a-13a. That section provides that nuclear industry employers may not "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee has made safety complaints or has otherwise participated in actions to carry out the purposes of the ERA or Atomic Energy Act. § 210(a), 42 U.S.C. § 5851(a). Moreover, the statute provides a detailed and specific administrative procedure for enforcing these prohibitions through investigations and hearings conducted by the Department of Labor, with review in the federal courts of appeals. §§ 210(b), (c), (d) and (e). Indeed, the statute specifically states that determinations under Section 210 "shall not be subject to judicial review in any criminal or other civil proceeding" (§ 210(c)(2)), thus indicating that Section 210 issues should not be considered in collateral state proceedings.

The remedies that Congress has provided are also unusually comprehensive. The Secretary of Labor is not only authorized to award the usual "make whole" remedies for employment discrimination (e.g., reinstatement and backpay), but may also award compensatory damages for pain and suffering, emotional distress, reimbursement of medical expenses, etc. § 210(b)(2)(B). See, e.g., *English v. Whitfield*, 858 F.2d at 964; *De Ford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). In fact, the Secretary may also award a Section 210 complainant attorney's fees and litigation expenses (*id.*), and the Secretary (but *not* the complainant) may even seek punitive damages in judicial proceedings brought to enforce Section 210 orders against employers who disregard those orders. *Compare* § 210(d) *and* § 210(e).

It is equally clear that English's claim in the instant case seeks to regulate conduct governed by and fully compensable under Section 210. See Pet. App. 18a. Indeed, English already invoked these pervasive federal remedies when she first complained about her alleged mistreatment. In reviewing the Secretary's decision in English's earlier DOL proceeding, the Fourth Circuit expressly recognized that the same harassing actions alleged in the instant case may form the basis of a Section 210 violation, for which compensatory emotional distress damages may be recovered. *English v. Whitfield*, 858 F.2d at 958, 963-964.

Thus, the courts below plainly did not disregard this Court's decisions in determining that English's state claims sought to regulate conduct that fell within a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to intrude. *See Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637-638 (2d Cir. 1989) (dismissing RICO complaint involving alleged harassment of nuclear industry whistleblowers on the ground that Section 210 provides exclusive remedy for such harassment).

Moreover, the latter inference is even stronger when one considers that the subject matter of the federal regulatory scheme involves nuclear safety, where the federal interest is so dominant that preemption is presumed. Indeed, in *Pacific Gas & Electric*, 461 U.S. at 212, this Court held that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." While the courts below refused to find English's state claim preempted on the independent ground that Section 210 is a nuclear safety statute which falls within the *Pacific Gas* rationale, the dominant purpose of the ERA is safety. The whistleblower protections and remedies that Congress crafted are not primarily designed to regulate labor relations. Instead, they reflect Congress' considered judgment

about how best to promote and protect safety at nuclear facilities. See Senate Report accompanying Section 210, S. Rep. No. 95-848, 95th Cong., 2d Sess. p. 29 (1978) (purpose of Section 210 is to "help assure that employers do not violate requirements of the Atomic Energy Act"); *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984) ("[T]he overall plan of the ERA is to maintain public safety not restructure the employee-employer relationship."). In these circumstances, Section 210 must be deemed part of Congress' comprehensive federal scheme for ensuring nuclear safety, and hence it preempts state regulation of the same conduct under this Court's holding in *Pacific Gas & Electric*. *See Norman v. Niagara Mohawk*, 873 F.2d at 637 (finding Section 210 exclusive remedy for nuclear whistleblower harassment because, *inter alia*, "[i]n a field as specialized and technical as nuclear energy, the importance of [the] interplay between [DOL and NRC in considering whistleblower matters] cannot be overemphasized").

Nor is this conclusion changed, as English asserts (Petition at 18-20), by the Court's subsequent decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where the Court held that the Atomic Energy Act ("AEA") does not preempt state tort actions for personal injuries caused by nuclear radiation exposure. As the courts below recognized (Pet. App. at 14a-15a, 23a), this Court's finding of no preemption in *Silkwood* was premised on the fact that Congress' intent *not* to preempt radiation exposure suits was clear from the post-AEA enactment of the Price-Anderson Act, which established a system of indemnifying nuclear licensees for such nuclear exposure damages in state tort suits. That enactment "indicate[d] that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." 464 U.S. at 251-252.

Furthermore, as the lower courts noted (Pet. App. at 15a), the *Silkwood* Court's conclusion was also premised

on the belief that Congress would not have displaced state remedies without enacting a federal remedy for exposure to nuclear radiation or contamination. Here, by contrast, the two key underpinnings of *Silkwood* are absent: there is no similar indication of Congressional intent to use state tort law to regulate whistleblower claims of nuclear employees; and Congress has, in fact, provided a comprehensive federal remedy for such claims.

In short, English's state tort claim is properly preempted because whistleblower retaliation is a matter of federal nuclear safety regulation and also because Congress has established a pervasive federal statutory scheme to regulate such conduct.

B. State Actions Involving Whistleblower Claims Will Frustrate the Federal Scheme

As the courts below soundly predicted, there are at least three ways in which state tort actions by nuclear whistleblowers would frustrate the purposes and objectives of Section 210.

First, Section 210(g) of the ERA evidences a delicate balance in the rights and obligations of nuclear industry employers. See Pet. App. at 19a-21a. That provision states that the protections of Section 210(a) "shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended." The inclusion of such a limitation indicates a Congressional judgment that overarching nuclear safety concerns require that an employer be free to take action against an employee who deliberately causes safety violations—as in this case—without fear that those decisions will be second-guessed by a reviewing tribunal which may not be sufficiently attuned to nuclear safety considerations.

Second, the lower courts were equally on target in judging the effect that potential punitive damage awards

would have on considerations underlying Congress' enactment of Section 210. See Pet. App. at 21a-22a. As the foregoing demonstrates, Section 210 embodies a delicate balance between, on the one hand, the nuclear safety considerations that make the protection of whistleblowers important, and, on the other hand, the nuclear safety considerations that make it important not to chill an employer's right to take action against deliberate safety violators who can be a danger to themselves and others.

As part of this careful balance of interests, Congress decided not to permit Section 210 complainants to seek punitive damages. This decision represented a conscious, deliberate and informed judgment that nuclear industry employers should *not* be subject to such damages in suits by nuclear whistleblower employees. And this conclusion is made even clearer by the fact that Congress *did* permit punitive damages under the whistleblower provisions covering other industries (see Pet. App. at 21a) and specifically delineated the circumstances in which such damages should be permitted in the nuclear industry by allowing *the Secretary of Labor* (but not a Section 210 complainant such as petitioner) to seek such damages when employers disobey the Secretary's orders (§ 210(d)). Thus, the very possibility that such damages might be considered in a state tort action further supports a finding of preemption:

> "[T]o allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" [with the federal regulatory scheme] . . . because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress.

Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. at 287 (citations omitted).[4]

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[4] This Court's decision in *Silkwood* does not compel a different result. The *Silkwood* Court found in the Price-Anderson Act an

Indeed, the instant case presents a vivid example of the problem, since English's complaint admits that she deliberately left a radioactive spill in the Chemet Lab in an attempt to establish the legitimacy of her earlier safety complaints, and yet she seeks $2.3 billion in punitive damages because GE responded by removing her from the Lab. Thus, it is clear that the assertion of state jurisdiction in cases such as this would result in frustration of the very nuclear safety concerns Congress addressed when it enacted Section 210.

Third, the lower courts correctly concluded that allowing state tort suits would frustrate the safety considerations underlying the time limits built into the ERA. See Pet. App. at 22a. Those short limitations periods provide an incentive for employees who have been discriminated against for voicing internal safety complaints to raise their charges promptly and thus to precipitate the speedy airing of their underlying safety complaints.[5]

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express indication that Congress intended to allow state tort suits based on radiation exposure to proceed, whereas the ERA specifically excludes punitive damage claims by Section 210 complainants. Equally important, the federal statute and policies involved in *Silkwood* did not entail the same kind of delicate balancing that is inherent in Section 210. In particular, the potential for state court punitive damages in the *Silkwood* situation carries with it no downside safety risk—it would only serve to make employers more careful about accidental radiation exposure. By contrast, the possibility of massive punitive damages in a Section 210-type tort suit might make an employer so timid that dangerous employee acts would not be dealt with appropriately.

[5] The Department of Labor and the NRC have entered into a Memorandum of Understanding pursuant to which DOL notifies the NRC of all Section 210 complaints and the NRC provides DOL any technical assistance and advice relating to nuclear safety matters. See 47 Fed. Reg. 54585 (Dec. 3, 1982); *Kansas Gas & Electric Co.* v. *Brock*, 780 F.2d 1505, 1509-1510 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (discussing DOL and NRC cooperation and interaction on Section 210 matters).

Thus, as the courts below concluded, there are *safety* reasons for the short limitations periods, and those reasons would be undermined if employees could simply ignore the Section 210 filing period and, instead, file common law suits at any time during the typical three-year statute of limitations period for state tort suits.

English argues, however, that the lower courts' conclusions are not sufficient to support federal preemption because the areas of frustration and conflict identified by the courts are "hypothetical" and represent only "potential" conflicts. She contends that federal preemption is proper only when there is "actual conflict," and hence that her claim cannot be preempted until it is adjudicated, at which point it can be determined whether the resolution of her claim conflicts with Section 210. Thus, according to English, it is improper to preempt her tort claim if there is any possible outcome of her claim that would not actually conflict with Section 210. Petition at 14-17, citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

English's assertions are wrong for two reasons. First, the areas of frustration and conflict identified by the lower courts arise from the mere availability of state tort actions for whistleblower discrimination, not from the particular outcome of such suits. For example, the availability of long state tort limitations period may frustrate the nuclear safety purposes of the short limitations periods in Section 210. In this case, in fact, English did not file her tort suit until nearly three years after the alleged incidents about which she complains. In addition, her assertion of a multi-billion dollar claim for punitive damages shows why even the possibility of such a claim may inappropriately chill nuclear industry employers' appropriate response to deliberate safety violators.

Second, this Court's decisions make clear that federal preemption may be warranted by the risk of conflict

inherent in dual and disparate systems regulating the same conduct. For example, the Court has found that in the National Labor Relations Act ("NLRA") Congress intended to establish a delicate system of protected and prohibited activities in order to promote the ultimate goal of that statute—free collective bargaining—and that Congress also carefully chose some remedies for violation of that statute, while rejecting others. In view of this statutory scheme, and Congress' decision to commit the enforcement of that statute to a specific federal tribunal, this Court has judged that permitting states to regulate the same conduct that is governed by the federal statute presents a *risk* of conflict that makes federal preemption necessary. See *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. at 286 (1986) ("States may not regulate activity that the NLRA protects, prohibits or arguably protects or prohibits . . . [b]ecause 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.' "); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959) (noting that the Court's preemption doctrine is "concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes"); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 291 (1971), *quoting Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a *danger of conflict* between power asserted by Congress and requirements imposed by state law.") (emphasis added).[6]

[6] The Court recognized in *Lockridge* that "disparities in remedies and administration could produce substantial conflict . . . between the relevant state and federal regulatory schemes [which] could not [be] effectively and responsibly superintend[ed] on a case-by-case basis." 403 U.S. at 294. In addition, the Court specifically noted

Thus where, as here, Congress has created a delicately balanced system of rights and remedies and has committed enforcement of these rights to a federal administrative tribunal, it is entirely appropriate to regard the federal scheme as preempting state regulation of the same conduct. That obviously does not mean, as English asserts (Petition at 15-16), that Section 210 would also preempt state actions dealing with race discrimination, sex discrimination, etc., since Section 210 does not purport to deal with issues of that sort. It does mean, however, that English may not utilize state tort law to regulate whistleblower retaliation, and that it is unnecessary to await the outcome of her case to make that preemption determination.[7]

that the balance created by Congress could be disrupted by the availability of different remedies in state actions:

> [The dissent] apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming arguendo that petitioner's conduct was prohibited under both federal and state law, [the dissent] would deem it of no national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

Id. at 288 n.5.

[7] Although English argues that *California Coastal Comm'n* requires non-preemption if there is any possible state court judgment that would not directly conflict with Section 210, that case does not stand for the proposition for which English cites it. In that case, Granite, a mining company, challenged California's right to require a state permit before Granite could undertake mining activity on federal lands for which the company had already obtained the necessary federal permits. The company premised its preemption argument on three federal statutes and regulatory provisions. In

Finally, there remains English's contention that two decisions of this Court specifically permit North Carolina to supplement the federal remedies in Section 210 via an emotional distress claim, or to provide relief because her claim is based on a "separate font" of substantive rights. Petition at 10-14, citing *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ——, 100 L. Ed. 2d 410 (1988). Neither *Farmer* nor *Lingle* conflicts with the lower courts' decision in this case, and *Farmer* actually supports it.

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those provisions, the Court found affirmative evidence of Congress' intent *not* to preempt the imposition of state *environmental* regulations on such mining activities, although it found that there was reason to believe that Congress *had preempted* the application of state *land use management* regulations. While the Court recognized that state environmental regulations may sometimes be so severe as to rise to the level of land use regulations (480 U.S. at 587), Granite's challenge to the state permit requirement before the specific permit conditions were delineated prevented the Court from determining whether that line between non-preempted and preempted state actions had been crossed. Thus, it was in this context that the Court concluded that Granite's facial challenge to California's permit requirement before specific permit conditions had been imposed would have to stand or fall on the question of whether there was any possible set of permit conditions that would constitute permissible environmental regulation rather than preempted land use regulation.

Equally important, moreover, it appears that the *California Coastal* majority would have joined the four dissenting Justices in finding preemption if they had been convinced that environmental regulation and land use regulation were indistinguishable. See *id.* at 594. In this regard, the dissent believed that the federal permit system represented a careful balance between competing federal interests, and that states should not be permitted to re-strike that balance by a duplicative permit system. *Id.* at 605. Thus, if anything, *California Coastal Comm'n* teaches that where, as here, the states would be addressing the very same matters deliberately committed to a federal decisionmaker, the states are prohibited from acting.

Farmer v. Carpenters involved a union member's state court action against the union alleging that the union had discriminated against him in hiring hall referrals and had intentionally inflicted emotional distress on him through a campaign of public ridicule and incessant verbal abuse. All of the plaintiff's claims were held preempted by the NLRA except a very limited, potential emotional distress claim.

Despite the *Farmer* Court's conclusion that the plaintiff's emotional distress claim might not be preempted by the NLRA, *Farmer* plainly supports just the opposite determination in the instant case—i.e., that English's emotional distress claim is preempted by Section 210 of the ERA. The primary reason the Court found the possibility of no preemption in *Farmer* was the fact that the focus of an NLRB proceeding concerning the plaintiff's allegations would be entirely different from the focus of a state court proceeding on the plaintiff's emotional distress claim:

> Whether the statements or conduct of the respondents also caused [the plaintiff] severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award [the plaintiff] damages for pain, suffering or medical expenses.

430 U.S. at 304.[8]

By contrast, however, a proceeding under Section 210 covers the same ground as English's emotional distress claim in this case. As the lower courts recognized, under Section 210 the Secretary of Labor may consider claims

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[8] The Court later applied the same standard in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978), where the Court held that, for purposes of preemption, the "critical inquiry" is whether the controversy to be presented to the state tribunal is the same as, or different from, the controversy that could be presented to the NLRB.

for emotional and physical injuries and award damages for pain, suffering and medical expenses. Had the NLRB similarly dealt with such matters, the *Farmer* Court apparently would have held the plaintiff's emotional distress claim preempted.

More importantly, the *Farmer* Court was careful to emphasize that all of the plaintiff's employment discrimination claims *were* preempted and that those allegations *could not* form the basis of the plaintiff's state claims for intentional infliction of emotional distress. The Court stated:

> [D]iscrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle. Nor can threats of such discrimination suffice to sustain state court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

430 U.S. at 305 (footnote omitted).

For purposes of the instant case, then, the teachings of *Farmer* are clear. First, since DOL proceedings under Section 210 consider and remedy complainants' emotional distress injuries, English's present claim is preempted as a matter of law. Second, since all of English's allegations in support of her emotional distress claim are actually allegations of employment discrimination cognizable under Section 210, her claim must be preempted under the *Farmer* holding that instances of employment discrimination cannot be used to support state claims of emotional distress.

Nor is this conclusion changed by *Lingle v. Norge Division of Magic Chef*, decided last term. According to English, *Lingle* changed the law regarding NLRA preemption and established that "overlapping" or "parallel" state and federal claims may go forward even when the federal claims arise under a comprehensive federal regulatory scheme such as the NLRA or the ERA.

Lingle held no such thing, however. Contrary to English's assertion (Petition at 13), *Lingle* did not involve what is commonly known as "NLRA preemption" which, as explained above, prohibits states from regulating the same conduct that is governed by the federal statute. See *Lingle*, 100 L. Ed. 2d at 420 n.8 (noting that NLRA preemption is distinct from the preemption doctrine at issue in *Lingle*). Rather, *Lingle* involved alleged preemption under Section 301 of the Labor Management Relations Act ("LMRA"), which is aimed solely at ensuring uniformity in the interpretation of collective bargaining agreements under a system of federal common law. *Id.* at 417 and n.3. Given this goal, Section 301 preempts only state actions whose resolution requires interpretation of such bargaining agreements, and it does *not* bar independent state actions which are merely premised on the same facts but do not require any contract interpretation. *Id.* at 419-421. Thus, *Lingle* did nothing to change the Court's well-established doctrine that where, as here, Congress has legislated a comprehensive and delicately-balanced system of federal regulation which is enforced by a specified federal tribunal, states may not offer "parallel" or "overlapping" claims and remedies for the same conduct governed by the federal system.[9]

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[9] The remaining case cited by English, *Decanas v. Bica*, 424 U.S. 351 (1976), is also distinguishable from the instant case. The state statute challenged in that case prohibited the employment of illegal aliens, and this Court found that the allegedly preempting federal

II. THERE IS NO CONFLICT IN THE LOWER COURTS SUFFICIENT TO WARRANT CERTIORARI

English contends that this Court should grant certiorari to resolve a conflict among the lower courts as to the preemptive effect of Section 210. Petition at 20-22. She cites two allegedly conflicting decisions—one from a state supreme court and one from a federal district court—which held that Section 210 does not preempt state wrongful discharge claims.[10] The alleged conflict is neither significant enough nor precise enough to warrant certiorari.

First, English herself acknowledges that no other decisions involve preemption of the same tort claim (intentional infliction of emotional distress) at issue in the present case. See Petition at 21.

Second, in the only state supreme court decision holding a state tort claim not preempted by Section 210 (*Wheeler v. Caterpillar Tractor Co.*), the Illinois court decided the preemption issue *sua sponte* without the benefit of a thorough briefing and analysis of that question. See Pet. App. at 16a. Furthermore, *Wheeler* was premised on a very superficial reading of this Court's *Silkwood* decision. See *Wheeler* dissent and Pet. App. at 23a.

Third, none of the cases cited by English involved a plaintiff who, by her own admission, deliberately caused a violation of safety standards which resulted in a violation of the requirements of the Atomic Energy Act. As pointed out in the preceding section, this factor raises issues regarding competing nuclear safety considerations under Section 210(g) which are committed to the Department of Labor in consultation with the NRC. See note 5, *supra*. Thus, the preemption analysis applicable in this case may be different from that which might be appropriate in cases which do not involve deliberate nuclear safety violators.

Finally, no more significant conflict is presented by the First Circuit's recent reversal of the district court's preemption finding in *Norris v. Lumberman's Mutual Casualty Co.*, 687 F. Supp. 699 (D. Mass. 1988), *rev'd*, —— F.2d ——, 1989 WL 85883 (1st Cir. 1989), which was decided after English filed her petition. The First Circuit is the only circuit to have found that Section 210 does not preempt a state tort claim, but the *Norris* decision does not present a square conflict with the instant case.

As the First Circuit emphasized, unlike petitioner English, the plaintiff in *Norris* had made only internal safety complaints; thus, there was a substantial question whether the plaintiff even fell within the protections of Section 210(a), the remedies for which he himself had never sought to invoke. See 1989 WL 85883, p. 4 ("Unlike the case at bar, the plaintiff in *English* reported to the NRC that there were many safety hazards and illegal practices in the place where she worked"). In addition, the *Norris* plaintiff worked for an insurance company involved in inspectional services rather than

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statute (the Immigration Act) was not intended to regulate the employment of illegal aliens. 424 U.S. at 359. Here, by contrast, English is attempting to utilize state tort law to regulate alleged nuclear whistleblower retaliation, which is precisely the conduct that Congress intended to regulate in Section 210.

[10] *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502 (1985), *cert. denied*, 475 U.S. 1112 (1986); *Stokes v. Bechtel North American Power Corp.*, 614 F. Supp. 732 (N.D. Cal. 1985).

Three other decisions cited by English do not conflict with the instant case inasmuch as they held that state claims are preempted by Section 210. *Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772 (1988); *Norris v. Lumberman's Mutual Casualty Co.*, 687 F. Supp. 699 (D. Mass. 1988); *Snow v. Bechtel Construction, Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986).

The remaining decisions cited in the last section of English's petition (Petition at 23) involve preemption under Section 301 of the LMRA. For the reasons stated earlier in the discussion of this Court's *Lingle* decision, those cases have no relevance to the instant case.

for a nuclear facility. He was also pressing a different type of state tort claim against his insurance company employer, and the First Circuit carefully limited its holding accordingly: "We hold that there is no conflict between state law actions for wrongful discharge and [Section 210]." 1989 WL 85883, p. 8. Finally, the First Circuit specifically noted that, unlike the *English* case, Section 210(g) issues relating to deliberate safety violators were not implicated in *Norris*, so that this provision presented only a speculative conflict in that case. 1989 WL 85833, p. 7.

In sum, the smattering of lower court decisions dealing with Section 210 preemption do not present the kind of precise and pervasive conflict that makes certiorari appropriate in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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